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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	MM Docket No. 90-380
)	
RIO GRANDE BROADCASTING)	File No. BPH-880815MV
)	
ROBERTO PASSALACQUA)	File No. BPH-880816NN
)	
IRENE RODRIGUEZ DIAZ)	File No. BPH-880816OR
De McCOMAS)	
)	
UNITED BROADCASTERS COMPANY)	File No. BPH-880816OW
)	

For Construction Permit For a New FM Station
Broadcast Station On Channel No. 247A at
Rio Grande, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1999

Released: May 25, 1999

By the Commission:

1. By this action, we dismiss the Joint Request for Approval of Settlement Agreement, filed November 9, 1998, by Rio Grande Broadcasting Company (RGB) and United Broadcasters Company (United), which is conditioned upon the dismissal or denial of the competing applications of Roberto Passalacqua (Passalacqua) and Irene Rodriguez Diaz de McComas (McComas). We also refer the four pending applications to the Mass Media Bureau for processing in accordance with the Commission's competitive bidding procedures and stay the hearing proceeding pending the outcome of the auction. These actions are consistent with the recent Memorandum Opinion and Order in the broadcast auction proceeding, FCC 99-74 (rel. Apr. 20, 1999), clarifying that, except in the case of settlements executed by February 1, 1998, the Commission will resolve a specific qualifying issue only with respect to the winning bidder after the auction.

I. BACKGROUND

2. RGB, United, Passalacqua, and McComas are the remaining applicants for a new FM station in Rio Grande, Puerto Rico. The Review Board granted United's application on

comparative grounds and dismissed Passalacqua's application for lack of a viable transmitter site.¹ The Board did not consider McComas's alternative request for the addition of site availability and misrepresentation/candor issues against Passalacqua. In addition, the Board had previously reinstated McComas's application, which the Administrative Law Judge had dismissed because the application was not accompanied by an original signature.²

3. Applications for review of the Board's actions filed by each of the losing applicants were pending before the Commission when the D.C. Circuit in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (*Bechtel II*), invalidated the principal criterion used to resolve comparative broadcast cases. On February 25, 1994, this case became subject to a stay on the processing and adjudication of comparative broadcast applications pending resolution of the questions raised by *Bechtel II*.³ Thereafter, on August 5, 1994, McComas filed a Motion to Reopen the Record and Enlarge the Issues against RGB seeking the addition of *ex parte*, abuse of process, and character issues. In accordance with the comparative freeze policy, providing that the Commission would not bifurcate proceedings to decide non-comparative issues if such resolution would leave unresolved comparative issues as to other applicants, the Commission has taken no action on these matters.

4. Congress subsequently enacted legislation amending Section 309(j) of the Communications Act to expand the Commission's auction authority to include commercial broadcast applications and adopting Section 309(l) to govern the resolution of pending comparative broadcast cases involving applications filed before July 1, 1997. Specifically, Section 309(l) authorizes the Commission to use auctions to resolve these cases but requires that the Commission waive its regulations to facilitate settlements among such applicants "during the 180-day period" after enactment (that is, by February 1, 1998).

5. In the *First Report and Order* in MM Docket No. 97-234, the Commission adopted competitive bidding procedures to resolve mutually exclusive commercial broadcast applications and determined that these procedures would apply to all pending comparative broadcast cases.⁴ In prescribing procedures for pending cases that had not settled pursuant to Section 309(l), the Commission decided to follow its practice in prior auctions of deferring until after the auction consideration of all basic qualification issues and resolving such issues only with respect to an actual auction winner. On reconsideration, the Commission reaffirmed that applicants who were

¹*Rio Grande Broadcasting Co.*, 8 FCC Rcd 6256 (Rev. Bd. 1993), *recon. denied*, 8 FCC Rcd 8726 (Rev. Bd. 1993), *applications for review pending*.

²*Rio Grande Broadcasting Co.*, 6 FCC Rcd 5519 (Rev. Bd. 1991), *reversing Memorandum Opinion and Order*, FCC 91M-2432 (ALJ Aug. 6, 1991), *application for review pending*.

³*Public Notice, FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994).

⁴*Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licensees* (MM 97-234) (*First Report and Order*), 13 FCC Rcd 15920 (1998), *recon. denied*, *Memorandum Opinion and Order*, FCC 99-74 (rel. Apr. 20, 1999) (*Hereafter Reconsideration Order*).

not finally denied or dismissed would be entitled to participate in an auction without regard to outstanding qualifications issues.⁵ It clarified, however, that this would not be true in cases in which settlement agreements executed by February 1, 1998 were expressly conditioned upon the resolution of specified basic qualifications questions regarding non-settling applicants. In those circumstances, the Commission determined that requiring an auction, despite a contingent settlement agreement obviating the need for any auction, would contravene congressional intent underlying enactment of Section 309(l) to facilitate settlements of the pending cases.⁶

II. SETTLEMENT AGREEMENT

6. Two of the four remaining applicants, RGB and United, have entered into a settlement agreement providing for the merger of their applications into a single entity, NEWCO, in which RGB and United will each have a 50 percent equity interest. Under the terms of the settlement agreement, RGB will dismiss its application and United will amend its application to substitute NEWCO. The settlement agreement, which was executed and filed with the Commission on November 9, 1998, is conditioned upon the Commission's dismissing Passalacqua's application and McComas's application, the dismissal of both applications becoming final, and the Commission's approving the Joint Request.

7. The settlement agreement is generally supported by the Mass Media Bureau in the event the contingencies are met, but it is opposed by McComas and Passalacqua.⁷ The Bureau expresses no opinion on the merits of the issues relating to the dismissal of Passalacqua's and McComas's applications but suggests that the Commission withhold final grant of the Joint Request pending submission of the amendment substituting NEWCO for United. McComas and Passalacqua assert that approval of the agreement would be contrary to auction procedures providing that all pending applicants may participate in the auction and that any unresolved issues will be considered after the auction. McComas also contends that there is no basis to dismiss her application, since the Board reinstated her application in 1991 and neither RGB nor United

⁵Reconsideration Order at ¶ 18.

⁶*Id.* at ¶ 18 ("[C]onsistent with the underlying thrust of Section 309(l)(3) and settlements under our comparative freeze policy, applicants disqualified by the Commission pursuant to such a contingent settlement agreement executed by February 1, 1998 will be permitted to participate in an auction only if an auction becomes necessary as a result of a subsequent court decision that reverses their disqualification").

⁷Pending before the Commission are: (a) Comments, filed November 25, 1998, by the Mass Media Bureau; (b) Opposition to Joint Request, filed December 7, 1998, by Roberto Passalacqua; (c) Motion to Dismiss Joint Request and Opposition to Joint Request, filed December 4, 1998, by Irene Rodriguez Diaz de McComas; (d) Consolidated Reply, filed December 29, 1998, by Rio Grande Broadcasting and United Broadcasters Company; and (e) Reply in Further Support of Motion to Dismiss Joint Request and Opposition to Joint Request, filed January 12, 1999, by Irene Rodriguez Diaz de McComas. Also, on February 5, 1999, RGB and United filed a Motion to Strike McComas's Reply. McComas filed an Opposition to the Motion to Strike on February 17, 1999. Also pending are the following related pleadings that pertain to whether McComas is entitled to respond to the Consolidated Reply because it allegedly opposes the Motion to Dismiss: (a) Petition for Extension of Time, filed January 6, 1999, by McComas; and (b) Comments, filed January 11, 1999, by RGB and United.

appealed that reinstatement.⁸ In reply, the settling applicants maintain that the Commission's auction procedures do not preclude approval of the agreement because approval does not require the resolution of any *qualifying* issues but only the dismissal of two patently defective applications. They also assert that approval of this agreement would be consistent with prior instances in which the Commission has considered settlement agreements conditioned on Commission resolution of specific non-comparative issues involving competing applicants who were not parties to the settlement.⁹

III. DISCUSSION

8. We will dismiss the settlement agreement. As discussed above, for settlements entered into by February 1, 1998, pursuant to Section 309(l)(3), the Commission has resolved the merits of outstanding non-comparative issues involving applicants not participating in the settlement agreements.¹⁰ The Commission has concluded that Congress, in prescribing a period during which liberal settlement rules would apply, manifested an intent to afford applicants who had filed and litigated their applications under the old comparative system an opportunity to avoid having to participate in an auction. That intent, the Commission reasoned, would be frustrated by conducting an auction under those circumstances inasmuch as an auction would deprive the settling applicants of the relief expressly provided by Section 309(l)(3).¹¹

9. The settlement agreement in this case, however, was executed long after February 1, 1998. In denying reconsideration of the rules for competitive bidding procedures that govern frozen comparative cases,¹² we clarified that, except in the special circumstance of settlement

⁸ McComas also filed a further pleading purporting to reply to the settling applicants' reply. However, as set forth in note 17 below, the pleading is unauthorized and is dismissed. Thus, we have not considered the substance of McComas's reply.

⁹The settling applicants cite *Heidi Damsky*, 12 FCC Rcd 11688 (1998); *Breeze Broadcasting Co.*, 13 FCC Rcd 22548 (1998); and *Gonzales Broadcasting Inc.*, 12 FCC Rcd 12253, 12258-60 (1997).

¹⁰See, e.g., *Heidi Damsky*, 12 FCC Rcd 11688 (1998), *recon denied*, FCC 98-202 (rel. Aug. 25, 1998), *further recon. denied*, FCC 98-342 (rel. Jan. 6, 1999), *appeal pending*, *Heidi Damsky v. FCC*, Case No. 99-1018 (D.C. Cir. filed Jan. 13, 1999) (the Commission approved a settlement agreement among two applicants, affirmed the disqualification on financial grounds of a third applicant, and terminated the proceeding); *Breeze Broadcasting Co.*, 13 FCC Rcd 22548 (1998) (the Commission reversed the disqualification of one applicant in a three party proceeding and dismissed a settlement that was contingent on the third applicant's disqualification); *Gonzales Broadcasting Inc.*, 12 FCC Rcd 12253, 12258-60 (1997), *aff'd sub nom. Lorenzo Jelks v. FCC*, 146 F.3d 878 (D.C. Cir. 1998), *petition for rehearing and suggestion for rehearing en banc denied*, Order (D.C. Cir. Oct. 20, 1998), *petition for writ of certiorari denied* (Feb. 22, 1999) (the Commission approved a settlement agreement among four applicants and disqualified the fifth applicant on a financial issue).

¹¹ *Heidi Damsky*, FCC 98-342 at ¶¶ 11-12.

¹²*Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licensees* (MM 97-234), Memorandum Opinion and Order, FCC 99-74 ¶ 18 (rel. Apr. 20, 1999) (Hereafter *Reconsideration Order*).

agreements that were executed by February 1, 1998, an auction is required and pending applicants are entitled to participate as bidders without regard to non-final determinations as to their qualifications. As noted above, the Commission has concluded that it will resolve basic qualifying issues only with respect to the auction winner. We reject the argument that the outstanding issues in this case concern defective applications, rather than the non-settling applicants's basic qualifications. Our auction procedures were designed to avoid litigation over potentially irrelevant issues that would serve only to delay service to the public. These procedures, however, make no distinction between issues that could result in the denial of an application and issues that could result in the dismissal of an application. Certainly in the case of hearing issues litigated through the former Review Board, in which the ALJ was reversed, our procedures clearly provide that such issues will be considered only after an auction and only with respect to the actual auction winner. Any further consideration of either the site issue involving Passalacqua or the signature issue involving McComas would be potentially unnecessary, depending on the identity of the auction winner. We thus reject the contention that the issues involving McComas and Passalacqua must be adjudicated prior to the auction.

10. Moreover, the Commission in the *First Report and Order* specifically declined to extend the period during which liberal settlement rules would apply.¹³ Such a further extension would not further Congress's policy of encouraging early settlements in these cases, the Commission concluded, since Congress had prescribed a "significant yet not unlimited period" to allow applicants who filed before July 1, 1997 to avoid an auction. Thus, in the absence of a showing that extending the congressionally prescribed 180-day period in this specific case would serve the public interest, it would not be appropriate to waive auction procedures providing that the construction permit will be awarded by auction and that applicants remaining in the proceeding may participate in the auction without regard to unresolved questions as to their basic qualifications. The parties to the settlement agreement have made no such showing here.

11. In view of the foregoing, we dismiss the joint request because it was filed after February 1, 1998 and because the non-settling applicants, McComas and Passalacqua, are now entitled to participate in an auction without regard to the merits of issues that resulted in the dismissal of their applications by the Administrative Law Judge and/or the Review Board. We have made no determination as to whether the settlement agreement between RGB and United otherwise complies with Section 311(c) of the Communications Act, 47 U.S.C. § 311(c), and Section 73.3525 of the Commission's Rules, 47 C.F.R. § 73.3525, governing settlements among competing broadcast applications. Dismissal of the Joint Request is therefore without prejudice to the parties revising the agreement as they deem appropriate.

12. Having dismissed the contingent settlement agreement, it is now appropriate to refer the applications of RGB, United, Passalacqua and McComas to the Mass Media Bureau for processing in accordance with our competitive bidding procedures for the frozen hearing applicants. Of the original applicants for Channel 247A, all of whom filed their applications before July 1, 1997, only the above captioned applications are still pending before the Commission. Pursuant to Section 309(l)(2) restricting the qualified bidders in such auctions to persons filing applications before July 1, 1997, and our auction procedures providing that only

¹³First Report and Order, 13 FCC Rcd at 15948 ¶ 75.

applicants whose applications have not been finally denied by the Commission may participate, only United, RGB, Passalacqua and McComas are eligible to compete in the auction for a construction permit for a new FM station on Channel 247A (Rio Grande, Puerto Rico). The date of the auction, as well as the deadline for filing the mandatory short-form application,¹⁴ will be announced by a Public Notice issued under delegated authority by the Wireless Telecommunications Bureau and the Mass Media Bureau. By that Public Notice, the Bureaus will also seek comment on a variety of auction-specific procedural issues concerning the day-to-day conduct of the auction for the construction permit for FM Channel 247A (Rio Grande, Puerto Rico).

13. We will stay the hearing proceeding in MM Docket No. 90-380 pending the outcome of the auction. In the event that RGB, McComas, or Passalacqua wins the auction, the hearing proceeding will resume to consider questions pertaining to the actual auction winner only and only insofar as they are relevant under our auction procedures. There are questions regarding the qualifications of these applicants. Specifically, there is an unresolved petition to reopen the record seeking the addition of *ex parte*, abuse of process and character issues against RGB, as well as the non-comparative issues involving McComas and Passalacqua. Contrary to McComas's assertion, the Board's ruling reinstating her application is not final inasmuch as Passalacqua properly raised that matter in its application for review when this proceeding first became ripe for Commission review. Resumption of the hearing proceeding to consider the signature issue involving McComas's application will therefore be appropriate if McComas is the winning bidder.

14. With regard to Passalacqua, whether its application was properly dismissed by the Review Board for lack of a viable transmitter site is irrelevant under competitive bidding procedures providing that site issues will be considered against an auction winner only to the extent that there is a substantial and material question of false certification.¹⁵ As noted above, however, McComas alternatively requested the specification of site availability and misrepresentation/candor issues against Passalacqua, a request that the Review Board had no occasion to consider, given its rejection of the site amendment and outright dismissal of Passalacqua's application. In contrast to allegations concerning site availability (and due diligence in amending to a new site), a substantial and material question as to misrepresentation or lack of candor would be relevant if Passalacqua wins the auction. Before taking final action on Passalacqua's application we must therefore consider McComas's previous request for misrepresentation or candor issues, which was not reached by either the ALJ or the Board given their determinations as to the availability of Passalacqua's transmitter site.¹⁶ Thus, United is

¹⁴ In order to participate in the auction, pending applicants must file short-form applications indicating their intention to compete in the auction. First Report and Order, 13 FCC Rcd at 15950 ¶ 82.

¹⁵ See *First Report and Order*, 13 FCC Rcd at 15956 ¶ 99, indicating that we would consider unresolved site issues (or add new site issues if substantial and material questions of fact are raised in pending or new petitions to enlarge issues) against the winning bidder only to the extent the issues involve questions of false certification.

¹⁶ The ALJ found that Passalacqua had reasonable assurance of its transmitter site when it filed its application but that due to a misunderstanding the site was no longer available. He therefore directed Passalacqua to file a site amendment and denied McComas's July 2, 1992 Petition to Dismiss the Application of Roberto Passalacqua or

alone among the four remaining applicants in having no outstanding hearing issues or unresolved issue requests regarding its qualifications that would require resolution after the auction. Accordingly, unless United wins the auction, the hearing proceeding will resume to consider questions as to the winning bidder's basic qualifications only.

ORDERING CLAUSES

15. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Approval of Settlement Agreement, filed November 9, 1998, by Rio Grande Broadcasting Co. and United Broadcasters Company IS DISMISSED.

16. IT IS FURTHER ORDERED, That the Motion to Strike, filed February 5, 1999, by Rio Grande Broadcasting and United Broadcasters Company IS GRANTED, the Reply In Further Support Of Motion To Dismiss Joint Request For Approval Of Settlement Agreement And In Response To Consolidated Reply To Opposition To Joint Request For Approval Of Settlement Agreement, filed January 12, 1999, by Irene Rodriguez Diaz De McComas IS DISMISSED, and the Petition for Extension of Time, filed January 6, 1999, by Irene Rodriguez Diaz De McComas IS DISMISSED as moot.¹⁷

17. IT IS FURTHER ORDERED That the applications filed by Rio Grande Broadcasting Company (File No. BPH-880815MV), Roberto Passalacqua (File No. BPH-880816NN), Irene Rodriguez Diaz De McComas (File No. BPH-880816OR), and United Broadcasters Company (File No. BPH-880816OW) ARE REFERRED to the Mass Media Bureau for processing in accordance with the competitive bidding procedures for mutually exclusive commercial broadcast applications; and that Rio Grande Broadcasting Company, Roberto Passalacqua, Irene Rodriguez Diaz De McComas, and United Broadcasters Company ARE IDENTIFIED as the only qualified bidders, eligible to participate in the auction for a construction permit for a new FM station on Channel 247A in Rio Grande, Puerto Rico.

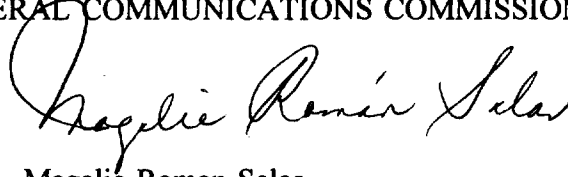
18. IT IS FURTHER ORDERED That the above-captioned hearing proceeding

Alternatively to Reopen the Record and Add Site Availability and Misrepresentation/Candor Issues. 7 FCC Rcd at 7690 ¶¶ 73-75. The Board reversed the ALJ and dismissed Passalacqua's application for lack of a viable transmitter site. 8 FCC Rcd at 6258-60 ¶¶ 10-15.

¹⁷McComas's January 12, 1999 reply is unauthorized and is dismissed; the related request for an extension of time to file such pleading is therefore moot. In their December 29, 1998 Consolidated Reply, United and RGB replied to oppositions filed on December 4 and 7, 1998, by McComas and Passalacqua, respectively. McComas, combined in a single pleading both an opposition and a motion to dismiss the settlement, and thus seeks to file a reply to the Consolidated Reply (as well as additional time for filing such further reply) insofar as that pleading opposes the motion to dismiss. Pursuant to 47 C.F.R. § 1.294(c) setting forth the only circumstances in which there is a right to file a reply, however, a party filing a motion to dismiss a settlement agreement is not authorized to file a reply to an opposition. And, as RGB and United note, Section 1.294(b) provides for the filing of additional pleadings not expressly authorized under subsection (c), only if specifically requested or authorized. The Commission has neither requested nor authorized a further pleading from McComas.

involving MM Docket No. 90-380 IS STAYED pending the outcome of the auction and the hearing proceeding WILL RESUME to consider the basic qualifications of the auction winner only if Rio Grande Broadcasting Company, Roberto Passalacqua, or Irene Rodriguez Diaz De McComas wins the auction, and otherwise IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Magalie Roman Salas".

Magalie Roman Salas
Secretary